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NOTE AND COMMENT

NECESSITY OF VALID CONTRACT TO SUPPORT ESCROW.—In *Foulkes* v. *Sengstacken,* (Ore. 1917) 163 Pac. 311, it is said that "A pure escrow presupposes the existence of a valid contract with sufficient parties, a proper subject matter, and a consideration. There must be an actual contract of sale on the one side and of purchase on the other, and until there is such a contract, the instrument executed by the supposed grantor, though in form a deed, is neither a deed nor an escrow." Accordingly it was held that performance of conditions by a grantee after the grantor had withdrawn the instrument from the custodian was ineffective to accomplish a conveyance. In its decision the court follows *Davis* v. *Brigham,* 56 Ore. 41, 107 Pac. 961, Ann. Cas. 1912B 1340, where the same doctrine, though probably not necessary to the decision, was laid down.

There has come to be considerable authority in the way of text-book statements, dicta by courts, and a few actual decisions, for the above proposition: 16 CYC. 562; 11 AM. & ENG. ENCY. LAW, (2nd ed.), 335; 1 DEVLIN, DEEDS, §313; *Stanton* v. *Miller,* 58 N. Y. 192, (1874); *Hoig* v. *Adrian College,* 83 Ill. 267, (1876); *Nichols* v. *Opperman,* 6 Wash. 618, (1893), (but see *Manning* v. *Foster,* 49 Wash. 541, 96 Pac. 233; *King* v. *Upper,* 57 Wash. 130. 106 Pac. 612, 1135, 31 L. R. A. N. S. 606); *Fitch* v. *Bunch,* 30 Cal. 208, (1866); *Miller* v. *Sears,* 91 Cal. 282, (1891); *Holland* v. *McCarthy,* 160 Pac. 1069, (1916); *Campbell* v. *Thomas,* 42 Wis. 437, (1877); *Clark* v. *Campbell,* 23 Ut.

569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716, (1901). See also *Anderson* v. *Messenger,* 158 Fed. 250, 85 C. C. A. 468, (1907); *Brown* v. *Allbright,* 110 Ark. 394, 161 S. W. 1036, Ann. Cas. 1915D (1913). This doctrine seems to have received the approval of Professor BIGELOW, of the University of Chicago Law School, 26 HARV. L. REV. 565.

A very effective and seemingly complete answer to the doctrine of the principal case has been made by Professor H. T. TIFFANY, in 14 COL. L. REV. 389, 399. He there says: "The view referred to has no considerations of policy or convenience in its favor, and its necessary result is considerably to detract from the practical utility of the doctrine of conditional delivery. One objection to such a view would seem to lie in the fact that the doctrine of conditional delivery is not peculiar to conveyances of land, but is recognized also in connection with contracts under seal and also bills and notes. If there can be no conditional delivery of a conveyance in the absence of a contract of sale, that is, a contract to execute a conveyance, it would seem a reasonable inference that there can be no conditional delivery of a contract under seal or a promissory note unless there is a contract to execute such an instrument. There is no more reason for requiring an auxiliary contract in the one case than in the others. Yet it has never been suggested, so far as the writer knows, that there can be a conditional delivery of a contract under seal or a promissory note only when there is a legally valid contract to execute the contract or note. Another consideration adverse to the view referred to lies in the fact that, while the doctrine of delivery in escrow was recognized at least as early as the first half of the fifteenth century (see Y. B. 13 HEN. IV, 8; Y. B. 8 HEN. VI, 26; Y. B. 10 HEN. VI, 25), a purely executory contract, not under seal, was not then enforceable either in the common law courts, or, it appears, in chancery. That being the case, the requirements of an extraneous contract in order to make the delivery in escrow effective would, in the fifteenth or sixteenth centuries, have necessitated a contract under seal, and it seems hardly probable that such a delivery of an obligation or conveyance under seal was always accompanied by another obligation under seal calling for its execution. The subject of delivery in escrow is treated with considerable fulness in at least two of the earlier books (PERKINS, CONVEYANCING, §§138-144; SHEPPARD'S TOUCHSTONE, 58, 59), and there is not the slightest suggestion in either as to the necessity of such an auxiliary contract. It is, to say the least, somewhat extraordinary that an integral element in a doctrine dating from the commencement of the fifteenth century should have remained to be discovered by a California court in the latter half of the nineteenth."

An agreement for the sale and conveyance of property, the consummation of the transaction to be postponed until payment of the purchase price or performance of some condition, is usually worked out in one of two ways: a binding, enforceable contract calling for the execution of a proper conveyance is entered into, or the conveyance is prepared at once, fully executed by the grantor with the exception of a complete delivery, and deposited with a third party in escrow to be fully operative upon the happening of the event specified. In the first, upon performance by the vendee and refusal

by the vendor, an action on the contract, normally, in the case of land, at least, for specific performance, is the remedy, and in such case it is of course vitally important that there be shown a binding contract. In the second, title passes *ipso facto* upon the performance by the purchaser, and the handing of the deed over to him is for that purpose unnecessary. It is submitted that in such cases it is not material that there is no *enforceable* agreement, and to hold, as in the principal case, that such agreement is necessary is to confuse the above two methods of accomplishing such a business transaction. Nor is such contract necessary to prevent the grantor from withdrawing his deed from the depositary, for by hypothesis the deed has been *delivered* by the maker to a third party, as to such transaction not the representative of the grantor, *to be delivered* to the grantee therein upon the happening of the event. As to the maker, such deed is a completed legal act. The very nature of an escrow therefore is such, it is submitted, that so long as the grantee has still the privilege of performing, the custodian may very properly, even must, say to the grantor upon demand for the instrument that he cannot comply.

In *Farley* v. *Palmer,* 20 Oh. St. 223, (1870), although the case might well have been disposed of on another ground, there is a very nice instance of the working out of the correct doctrine. Palmer and wife had contracted to sell and convey her land to Farley, and a deed signed, etc., by Palmer and wife had been executed and deposited in escrow to await the payment of the purchase price. Upon refusal by Farley to perform, Palmer and wife sued Farley to compel him to pay the price. He defended on the ground that since Mrs. Palmer as a married woman was not bound by the contract he could not be compelled to perform. The court, however, rejected this contention, holding that Mrs. Palmer *had already performed,* that she had no power to revoke the deed, and that upon performance by Farley the title would have vested in him *ipso facto* without further delivery. R. W. A.

LIMITATIONS UPON THE USE, AFTER SALE, OF PATENTED ARTICLES.—In the case of *Motion Picture Patents Co.* v. *Universal Film Co.,* 37 Sup. Ct. 416, the Supreme Court has just rendered a decision which reverses the much discussed case of *Henry* v. *Dick Co.,* 224 U. S. 1. The opinion was by a divided court, however, as three of the justices dissented, and Justice MCREYNOLDS "concurred in the result" only. It can, therefore, hardly be said to settle the ultimate rule as in contradiction to that followed in *Henry* v. *Dick Co.,* and discussion of the case is of something more than mere academic value.

The facts were that the plaintiff was owner of a patent covering a necessary part of the mechanism on moving picture projecting machines. This particular device was of such efficiency as to be in general use, to the practical exclusion of all substitutes. The plaintiff granted a license to manufacture and sell these parts, the licensee agreeing that it would not sell them except under agreement with each vendee, for himself and his assigns, that they should be used only with a certain type of film. This licensee sold a machine